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Atty. Docket No. SP-0649.1 (EVE01 P-565)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Art Unit : 1745
Examiner : C. Chaney
Applicant : John C. Nardi
Appln. No. : 09/213,544
Filing Date : December 17, 1998
For : ALKALINE CELL HAVING A CATHODE INCORPORATING
ENHANCED GRAPHITE

Assistant Commissioner for Patents
Washington D.C. 20231

APPELLANT'S BRIEF (37 CFR §1.192)

This brief is in furtherance of the Notice of Appeal, filed in this case on
November 14, 2000.

The fees required under §1.17(f), and any required petition for extension of time for
filing this brief and fees therefor, are dealt with in the accompanying TRANSMITTAL OF
APPEAL BRIEF.

This brief is transmitted in triplicate. (37 CFR §1.192(a)).

This brief contains these items under the following headings, and in the order set forth
below (37 CFR §1.192(c)):

- I. Real Party in Interest
- II. Related Appeals and Interferences
- III. Status of Claims
- IV. Status of Amendments
- V. Summary of Invention
- VI. Issues
- VII. Grouping of Claims
- VIII. Arguments
 - A. U.S. Patent No. 5,482,798 issued to Mototani et al.
 - B. Legal Considerations
- IX. Conclusion

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Appendix of Claims Involved in the Appeal

The final page of this brief bears the attorney's signature.

I. Real Party in Interest

The real party in interest in this application is Eveready Battery Company, Inc., the assignment to which was recorded at Reel 9659, Frame 0594.

II. Related Appeals and Interferences

Appellant is aware of no appeals or interferences that would directly affect or be directly affected by, or have a bearing on, the Board's decision in the pending appeal.

III. Status of Claims

This is an appeal from a Final Rejection of claims 1-13 and 15-21 of the above-identified application. Claims 1-17 were originally presented, and new claims 18-21 were added by way of amendment to this application. Claim 14 has been cancelled, without prejudice. No claims currently stand allowed. Appealed claims 1-13 and 15-21, as last amended, are attached in the Appendix hereto.

IV. Status of Amendments

An amendment was filed on October 16, 2000, in response to the Final Office Action mailed on June 14, 2000. An Advisory Action was mailed on November 7, 2000. In the Advisory Action, the Examiner indicated that the proposed amendments will be entered upon the timely submission of a Notice of Appeal and Appeal Brief with requisite fees. Accordingly, all amendments filed in this application should be entered upon the filing of this brief.

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V. Summary of the Invention

The present invention generally relates to an electrochemical cell (10), such as is shown in FIG. 1, employing an active material and an enhanced electrically conductive carbon material in the positive electrode, i.e., cathode (20). The carbon material includes expanded graphite particles (see FIG. 3) having a kerosene absorption value in the range of 2.2 to 3.5 ml/g. It should be appreciated that the expanded graphite particles exhibit certain characteristics which Appellant has discovered result in a conductive matrix having low volume consumption and reduced polarization so as to achieve enhanced electrochemical cell performance. Accordingly, enhanced cell performance is achieved by employing a cathode containing the selected expanded graphite particles exhibiting a kerosene absorption value within a specified range according to the teachings of the present invention.

Appellant believes that when expanded graphite particles having too low of a kerosene absorption value are employed in the cathode of an alkaline electrochemical cell, insufficient liquid potassium hydroxide (KOH) is absorbed, resulting in excessive polarization and/or requiring a larger amount of expanded graphite to be employed. At the other extreme, when the expanded graphite particles have too high of a kerosene absorption value, the cathode exhibits poor molding characteristics and allows excessive liquid KOH to collect at the cathode-to-can interface. The presence of liquid at the cathode-to-can interface increases the electrical resistance of the cell, and also leaves a deficiency of KOH within the cathode, thereby increasing polarization during cell discharge. If more KOH is added to the cathode to compensate for the deficiency, less volume is available for active material, and the discharge capacity of the cell is reduced. As described in more detail below, the present invention overcomes the deficiencies present in conventional electrochemical cells and provides for an electrochemical cell having expanded graphite particles with a kerosene absorption value within the range of 2.2 to 3.5 ml/g. By employing an expanded graphite having a kerosene absorption value in the range of 2.2 to 3.5 ml/g, the above mentioned problems, which Appellant believes exist in known commercial cells employing expanded graphite, are avoided, thereby resulting in superior electrochemical cell performance.

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As shown in FIGS. 4 and 7 and described throughout the specification, the present invention employs expanded graphite particles having a kerosene absorption value within the range of 2.2 to 3.5 ml/g in the cathode of an electrochemical cell to enhance cell performance, in contrast to cells employing expanded graphite particles with kerosene absorption values outside the claimed range. While various conventional expanded graphites are known, Appellant has discovered that by employing those expanded graphite particles having a desired kerosene absorption value within the claimed range of 2.2 to 3.5 ml/g, enhanced cell performance is achieved. One process for making expanded graphite particles having a kerosene absorption value within the claimed range of 2.2 to 3.5 ml/g is shown in FIG. 2, and described in the specification on page 8, line 8 through page 9, line 18, and is further described on page 10, line 19 through page 14, line 10. It should be appreciated that by starting with the natural mineral flake graphite according to the preferred embodiment, and processing the graphite by acid impregnation and controlled heating, a resultant expanded graphite is obtained having the claimed kerosene absorption characteristics employed in an electrochemical cell. As explained on page 7, lines 19 and 20 of the specification, there are many known methods for expanding graphite. Appellant believes that the kerosene absorption value of expanded graphite particles varies based on a number of factors including the origin of the starting graphite material, and variations in the processing of the graphite to produce the expanded graphite particles. Despite the existence of various known methods for making expanded graphite particles, Appellant's invention is the discovery that the utilization of those expanded graphite particles having a kerosene absorption value as specified in the claims in an electrochemical cell results in enhanced cell performance.

VI. Issues

The issue on appeal is whether claims 1-13 and 15-21 are patentable under 35 U.S.C. §103(a) over U.S. Patent No. 5,482,798, issued to Mototani et al.

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VII. Grouping of Claims

For purposes of this appeal, all of claims 1-13 and 15-21 stand or fall together.

VIII. Arguments

In the arguments below, a brief description is provided of the reference to Mototani et al., followed by Appellant's arguments as to why a *prima facie* case of obviousness has not been established based on the cited reference.

A. U.S. Patent No. 5,482,798 issued to Mototani et al.

The Mototani et al. patent discloses an alkaline battery having a positive electrode active material comprising manganese dioxide and electroconductive carbon material. The electroconductive carbon material in Mototani et al. comprises expanded graphite particles preferably having an average particle size in the range of 0.5 to 15.0 micrometers, and more preferably 0.5 to 6.0 micrometers. The amount of expanded graphite particles used in Mototani et al. is 2 to 8 percent by weight based on the solids in the positive electrode material. Column 3, lines 40-52 of Mototani et al. further discloses an example of a battery having electroconductive carbon material in the range of 0.5 to 30.0 micrometers, but explains that batteries having expanded graphite with an average particle size of 30 micrometers were little different from those with unexpanded graphite of the same size (see Column 4, lines 21-24). Mototani et al. expressly provides that the expanded graphite should be produced from artificial graphite (see Column 3, lines 13-14). In Appellant's opinion, Mototani et al. does not adequately describe the process of making the expanded graphite sufficient to determine certain definite physical characteristics of the resultant expanded graphite, including kerosene absorption. The process of making expanded graphite is briefly stated on column 3, lines 45-51 of the Mototani et al. patent, which reads "expanded graphite particles which had been prepared by introducing sulfuric acid into between interlayers of the artificial graphite used as a starting material and heating rapidly the graphite at a temperature of 800° to 1000°C to expand greatly

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spaces between the interlayers of the graphite in the direction perpendicular to the plane of interlayer and then crushing the resultant expanded graphite." No further details on the formation and/or processing of expanded graphite are given in Mototani et al.

B. Legal Considerations

Appellant respectfully submits that the Examiner has failed to establish *prima facie* obviousness of the claimed invention over the teaching of Mototani et al. Section 2143 of the latest revision of the *Manual of Patent Examining Procedures* (MPEP) states the following regarding the requirements for establishing a *prima facie* case of obviousness:

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. [emphasis added]

Appellant submits that the Mototani et al. reference does not teach or suggest all of the claimed features of the invention. Appellant also submits that there is not a reasonable expectation that expanded graphite made according to the teachings of Mototani et al. would have the claimed features. For these reasons, Appellant submits that the Examiner has failed to establish a *prima facie* case of obviousness.

Appellant's claimed invention, as recited in claim 1, provides for an electrochemical cell comprising a positive electrode having an active material and an electrically conductive carbon material including expanded graphite particles having a kerosene absorption value in the range of 2.2 to 3.5 ml/g. By employing an electrically conductive carbon with expanded graphite particles having a kerosene absorption value in the range of 2.2 to 3.5 ml/g, Appellant's electrochemical cell advantageously achieves enhanced service performance as is generally shown in FIGS. 4 and 7. As is particularly shown in FIG. 7, the

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average cell performance is significantly enhanced by employing expanded graphite particles having a kerosene absorption value within the claimed range of 2.2 to 3.5 ml/g, and provides the most noticeable advancement in service performance by employing expanded graphite particles having a kerosene absorption value within the range of 2.7 to 3.1 ml/g, which is recited in claims 4, 18, 20 and 21.

Nowhere does Mototani et al. teach or even suggest the use of expanded graphite particles having a kerosene absorption value in the range set forth in Appellant's claims. Mototani et al. does not disclose any specific kerosene absorption characteristics whatsoever, and does not teach or suggest the relevance, importance, or desirability of selecting expanded graphite particles having a kerosene absorption value within Appellant's the claimed range. Mototani et al. does not even disclose physical properties of the expanded graphite other than particle size and content, let alone any mention of the significance of employing expanded graphite particles having other physical characteristics in a cell.

In the Final Office Action, the Examiner stated that because the processes for performing expanded graphite disclosed by Applicant and the prior art are similar, the materials produced will be similar, and thus have similar physical properties, including kerosene absorption values. The Examiner cited MPEP §2112.01 for the proposition that products of identical chemical composition can not have mutually exclusive properties, and concluded that if the prior art teaches the identical chemical structure, the properties Applicant discloses and/or claims are necessarily present. The Examiner has incorrectly assumed that Appellant's expanded graphite is identical to that disclosed in Mototani et al. in terms of the starting material and the process of making the expanded graphite.

With respect to the appropriate test for determining whether inherency is established, MPEP §2112 states:

"The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic." *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993).

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“To establish inherency, the extrinsic evidence ‘must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.’” *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1945, 1950-51 (Fed. Cir. 1999).

“In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art.” *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990).

It is respectfully submitted that the Examiner is relying on mere probability or possibility to establish inherency as a basis for the rejection, and has not provided a basis in fact and/or technical reasoning to reasonably support a determination that the allegedly inherent characteristic necessarily flows from the teachings of the Mototani et al. reference. In the Amendment filed on October 16, 2000, Appellant’s submitted a Declaration, signed by the inventor of the present application, which sets forth evidence that there exist expanded graphites that do not exhibit kerosene absorption values within the claimed range. The inventor’s Declaration illustrates that the Examiner has incorrectly assumed that Mototani et al. necessarily discloses identical materials inherently having the identical kerosene absorption properties. In should be appreciated that the kerosene absorption properties of expanded graphite may vary from one sample of expanded graphite particles to another. Factors which may determine the characteristics of expanded graphite particles may include the starting graphite material and variances in the processing thereof, which can affect particle size, surface area, kerosene absorption, purity, and other characteristics of the expanded graphite. Appellant has discovered that by employing those expanded graphite particles within the claimed kerosene absorption range in an electrochemical cell, enhanced service performance can be achieved.

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In the Advisory Action, the Examiner stated that the Affidavit (Declaration) filed fails to distinguish Applicant's invention from the Mototani et al. reference. The Examiner further stated that Applicant's Affidavit illustrates properties of commercially available expanded graphite, which are not relevant to the Mototani et al. invention. As discussed above, the Declaration was submitted to illustrate that various samples of expanded graphite materials may have different kerosene absorption characteristics. Appellant wanted the Examiner to understand that various expanded graphites exist having different kerosene absorption values. Appellant has discovered that by employing those expanded graphite particles having a kerosene absorption value in the range of 2.2 to 3.5 ml/g, enhanced electrochemical cell performance can be achieved. It is this discovery which Appellant believes he is entitled to a United States Letters Patent in view of the Mototani et al. reference.

Furthermore, Appellant would like to point out that he attempted to have expanded graphite particles manufactured according to the teachings described in Mototani et al. However, Appellant realized that the Mototani et al. reference does not describe in sufficient detail how to make the expanded graphite so as to enable one skilled in the art to make samples with a definite known kerosene absorption. Accordingly, Appellant was unable to make and test a comparative product and supply comparative data comparing the specific characteristics of expanded graphite particles manufactured according to Mototani et al. with the claimed characteristics of the present invention. In lieu of comparative data, the Declaration illustrates that testing of several samples of commercially available expanded graphite indicates that the expanded graphite of Mototani et al. would not necessarily exhibit the claimed characteristics. Thus far, the Examiner has not provided any evidence to show that Mototani et al. would in fact necessarily include expanded graphite having the claimed kerosene absorption characteristics as set forth in Appellant's claimed invention.

MPEP §2112.01 provides that when the PTO shows a sound basis for believing that the products of the Applicant and the prior art are the same, the Applicant has the burden of showing that they are not. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). The MPEP further states that the *prima facie* case can be rebutted by evidence showing

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that the prior art products do not necessarily possess the characteristics of the claimed product. *In re Best*, 562 F.2d at 1255, 195 USPQ at 433. It is Appellant's position that the Examiner clearly has not demonstrated that the expanded graphite employed in the electrochemical cell in Mototani et al. necessarily possesses the kerosene absorption characteristics recited in the claims. The specification and FIG. 4 of Appellant's application for Letters Patent, as well as the inventor's Declaration, clearly illustrate that expanded graphite particles may exhibit varying kerosene absorption values, thereby supporting the position that the Examiner's burden for establishing *prima facie* obviousness has not been met. The evidence presented by Appellant further rebuts any *prima facie* case that arguably could have been established.

For the reasons discussed above, Appellant submits that claims 1-13 and 15-21 are allowable over the teaching of Mototani et al.

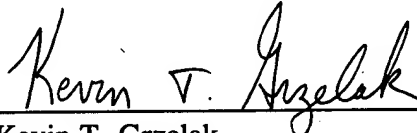
IX. Conclusion

For the reasons set forth above, and as apparent from examining the invention defined by claims 1-13 and 15-21, when properly considering the cited reference, these claims define patentable subject matter. Accordingly, reversal of the rejection of these claims under 35 U.S.C. §103(a) is appropriate and is respectfully solicited.

Respectfully submitted,

JOHN C. NARDI

By: Price, Heneveld, Cooper,
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January 16, 2001.
Date

KTG/jrb

Appendix of Claims (37 CFR §1.192(c)(9))



1. An electrochemical cell comprising a positive electrode having an active material and an electrically conductive carbon material including expanded graphite particles having a kerosene absorption value in the range of 2.2 to 3.5 ml/g.
2. The electrochemical cell as defined in claim 1, wherein said expanded graphite particles have an average particle size in the range of 17 to 32 micrometers and a d_{90} value in the range of 40 to 85 micrometers.
3. The electrochemical cell as defined in claim 2, wherein said expanded graphite particles have a d_{10} value in the range of 3 to 9 micrometers.
4. The electrochemical cell as defined in claim 2, wherein said expanded graphite particles have a kerosene absorption in the range of 2.7 to 3.1 ml/g.
5. The electrochemical cell as defined in claim 2, wherein said expanded graphite particles have a surface area-to-mass ratio of at least 18 m²/g.
6. The electrochemical cell as defined in claim 5, wherein said expanded graphite particles have a tap density in the range of 0.09 to 0.14 g/cc.
7. The electrochemical cell as defined in claim 6, wherein said expanded graphite particles have a Scott density of no greater than 0.07 g/ml.

8. The electrochemical cell defined in claim 2, wherein said active material of said positive electrode comprises primarily manganese dioxide.
9. The electrochemical cell defined in claim 1, wherein said expanded graphite particles are derived from natural graphite.
10. The electrochemical cell defined in claim 1, wherein said expanded graphite particles comprise 3.2 to 6.25 weight percent of the cathode.
11. The electrochemical cell as defined in claim 1, wherein said expanded graphite particles have a purity level of greater than 99.9 percent, as determined by weight loss on ignition.
12. The electrochemical cell as defined in claim 11, wherein said graphite particles have a purity level greater than 99.95%.
13. The electrochemical cell as defined in claim 11, wherein said expanded graphite particles have impurities including any of antimony, arsenic, molybdenum, vanadium, chromium, iron, copper, and tin, and wherein an aggregate total of said impurities amounts to no greater than 200 parts per million.

15. The electrochemical cell as defined in claim 14, wherein said expanded graphite particles have an average particle size in the range of 17 to 32 micrometers and a d_{90} value in the range of 40 to 85 micrometers.

16. An electrochemical cell comprising a positive electrode comprising an active material and an electroconductive carbon material, the carbon material including expanded graphite particles having an average particle size in the range of 17 to 32 micrometers, a d_{90} value in the range of 40 to 85 micrometers, a d_{10} value in the range of 3 to 9 micrometers, a kerosene absorption value of 2.2 to 3.5 ml/g, a tap density in the range of 0.09 to 0.14 g/cc and a Scott density of no greater than 0.07 g/ml.

17. The electrochemical cell as defined in claim 16, wherein said expanded graphite particles have a purity level of greater than 99.9%, as determined by weight loss on ignition, and contain any of antimony, arsenic, molybdenum, vanadium, chromium, iron, copper, and tin as impurities, and wherein the aggregate total of said impurities is no greater than 200 parts per million.

18. The electrochemical cell as defined in claim 1, wherein the expanded graphite particles have a kerosene absorption value in the range of 2.7 to 3.1 ml/g.

19. The electrochemical cell as defined in claim 18, wherein the expanded graphite particles have a purity level greater than 99.9 percent.

20. The electrochemical cell as defined in claim 14, wherein said expanded graphite particles have a kerosene absorption value in the range of 2.7 to 3.1 ml/g.

21. The electrochemical cell as defined in claim 16, wherein the expanded graphite particles have a kerosene absorption value in the range of 2.7 to 3.1 ml/g.



AF 1745

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CERTIFICATE OF MAILING

I hereby certify that this paper, together with all enclosures identified herein, are being deposited with the United States Postal Service as first class mail, addressed to the Assistant Commissioner for Patents, Washington D.C. 20231, on the date indicated below.

January 16, 2001.
Date

Jacki R. Buckley

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Art Unit : 1745
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Applicant : John C. Nardi
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ENHANCED GRAPHITE

Assistant Commissioner for Patents
Washington D.C. 20231

TRANSMITTAL OF APPEAL BRIEF
(PATENT APPLICATION - 37 CFR §1.192)

1. Transmitted herewith, in triplicate, is the APPELLANT'S BRIEF in this application, with respect to the Notice of Appeal filed on November 14, 2000.

2. STATUS OF APPLICANTS

This application is on behalf of:

☒ other than a small entity.

☐ a small entity.

A verified statement:

☐ is attached.

☐ was already filed.

3. FEE FOR FILING APPEAL BRIEF

Pursuant to 37 CFR §1.17(c), the fee for filing the Appeal Brief is:

☐ small entity \$155.00

☒ other than a small entity \$310.00

Appeal Brief fee due: \$310.00

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4. EXTENSION OF TERM

The proceedings herein are for a patent application and the provisions of 37 CFR §1.136 apply.

(complete (a) or (b), as applicable)

(a) ☐ Applicant petitions for an extension of time under 37 CFR §1.136:

Extension (months)	Fee for other than small entity	Fee for small entity
<input type="checkbox"/> one month	\$110.00	\$55.00
<input type="checkbox"/> two months	\$390.00	\$195.00
<input type="checkbox"/> three months	\$890.00	\$445.00
<input type="checkbox"/> four months	\$1,390.00	\$695.00

FEE: \$_____

If an additional extension of time is required, please consider this a petition therefor.

(check and complete the next item, if applicable)

(b) ☒ Applicant believes that no extension of term is required. However, this conditional petition is being made to provide for the possibility that applicant has inadvertently overlooked the need for a petition and fee for extension of time.

5. TOTAL FEE DUE

The total fee due is:

Appeal Brief fee: \$310.00

Extension fee (if any) \$_____

TOTAL FEE DUE: \$310.00

Applicant : John C. Nardi
Appln. No. : 09/213,544
Page : 3

6. FEE PAYMENT

 x Attached is a check in the sum of \$310.00.

 Charge Account No. 05 1325 the sum of \$_____.

A duplicate of this transmittal is attached.

7. FEE DEFICIENCY

 x If any additional extension and/or fee is required, this is a request therefor
and to charge Account No. 05 1325.

and/or

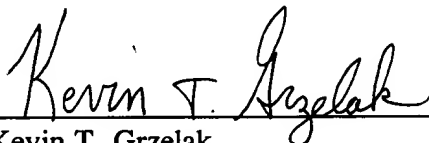
 x If any additional fee for claims is required, charge Account No.
05 1325.

Respectfully submitted,

JOHN C. NARDI

By: Price, Heneveld, Cooper,
DeWitt & Litton

January 16, 2001.
Date



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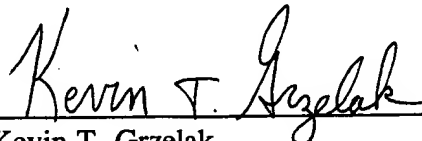
and/or

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